



07-03-07

20 AF

<b>CERTIFICATE OF MAILING BY "EXPRESS MAIL" (37 CFR 1.10)</b>			Docket No. <b>Muller-27</b>	
Applicant(s) <b>Michael Brock et al.</b>				
Application No. <b>09/890,696</b>	Filing Date <b>12/16/2001</b>	Examiner <b>Wang, Shengjun</b>	Customer No. <b>39703</b>	Group Art Unit <b>1617</b>

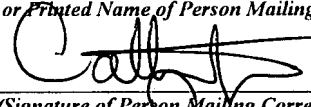
Invention: **Microemulsion Containing Alkanol-ammonium Salts of Fatty Alcohol Sulfates and/or Alkylpolyalkylene-glycoether Sulfates**

I hereby certify that the following correspondence:

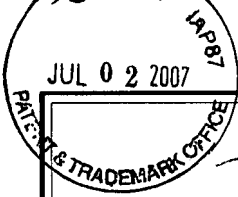
**Appeal Brief and all related enclosures**

*(Identify type of correspondence)*

is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on July 2, 2007  
*(Date)*

**Cathy Hayes**  
*(Typed or Printed Name of Person Mailing Correspondence)*  
  
*(Signature of Person Mailing Correspondence)*  
**EV317508719US**  
*("Express Mail" Mailing Label Number)*

**Note: Each paper must have its own certificate of mailing.**



**TRANSMITTAL LETTER**  
**(General - Patent Pending)**

Docket No.  
**Muller-27**

In Re Application Of: **Michael Brock et al.**

Application No.	Filing Date	Examiner	Customer No.	Group Art Unit	Confirmation No.
09/890,696	12/16/2001	Wang, Shengjun	39703	1617	6217

Title: **Microemulsions Containing Alkanol-ammonium Salts of Fatty Alcohol Sulfates and/or Alkylpolyalkylene-glycolether Sulfates**

COMMISSIONER FOR PATENTS:

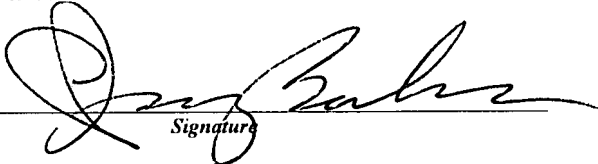
Transmitted herewith is:

Appeal Brief <sup>30</sup> (7 pages)

in the above identified application.

- ☐ No additional fee is required.
- ☒ A check in the amount of \$500.00 is attached.
- ☒ The Director is hereby authorized to charge and credit Deposit Account No. 02-4345 as described below.
- ☐ Charge the amount of
- ☒ Credit any overpayment.
- ☒ Charge any additional fee required.
- ☐ Payment by credit card. Form PTO-2038 is attached.

**WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.**

  
Signature

Dated: July 2, 2007

C. James Bushman, Reg. No. 24,810  
Browning Bushman P.C.  
5718 Westheimer, Suite 1800  
Houston, Texas 77057-5771  
Tel: (713) 266-5593  
Fax: (713) 266-5169

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to the "Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on

7-2-07

(Date)

Signature of Person Mailing Correspondence

Cathy Hayes

Typed or Printed Name of Person Mailing Correspondence

cc:



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of:

Michael Brock, Martin Stolz,  
Sabine Diesveld-Koller,  
Eva-Maria Koberstein, Ursula Michel,  
and Heinz Napierala

U.S. Serial No.: 09/890,696

U.S. Filing Date: 12/16/2001

For: *Microemulsion Containing Alkanol-  
ammonium Salts of Fatty Alcohol  
Sulfates and/or Alkylpolyalkylene-  
glycolether Sulfates*

§ Attorney Docket No.: Muller-27

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

§

Art Unit: 1617

Confirmation No.: 6217

Examiner: Wang, Shengjun

**APPELLANTS' APPEAL BRIEF**

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

This is an appeal from the Final Rejection of Claims 11-17 and 20 as set forth in the Office Action of November 2, 2006. A Notice of Appeal was filed by Appellants on May 2, 2007 setting a deadline of July 2, 2007 for Appellants to file this Appeal Brief.

07/05/2007 RFEKADU1 00000026 09890696

01 FC:1402

500.00 0P

**TABLE OF CONTENTS**

<b>I.</b>	<b>REAL PARTIES IN INTEREST .....</b>	<b>3</b>
<b>II.</b>	<b>RELATED APPEALS AND INTERFERENCES.....</b>	<b>4</b>
<b>III.</b>	<b>STATUS OF CLAIMS .....</b>	<b>5</b>
<b>IV.</b>	<b>STATUS OF AMENDMENTS .....</b>	<b>6</b>
<b>V.</b>	<b>SUMMARY OF THE CLAIMED SUBJECT MATTER .....</b>	<b>7</b>
<b>VI.</b>	<b>GROUND OF REJECTION TO BE REVIEWED ON APPEAL.....</b>	<b>10</b>
<b>VII.</b>	<b>ARGUMENT .....</b>	<b>11</b>
A.	REJECTIONS UNDER 35 U.S.C. §103(A) OVER LERG ET AL. ....	11
1.	<i>Obviousness Standard</i> .....	11
2.	<i>Claims 11-17 and 20</i> .....	11
B.	REJECTIONS UNDER 35 USC 103 OVER HERMANN ET AL. ....	20
1.	<i>Obviousness Standard</i> .....	20
2.	<i>Claims 11-17 and 20</i> .....	20
C.	CONCLUSION.....	23
<b>VIII.</b>	<b>CLAIMS APPENDIX.....</b>	<b>24</b>
<b>IX.</b>	<b>EVIDENCE APPENDIX.....</b>	<b>29</b>
<b>X.</b>	<b>RELATED PROCEEDINGS APPENDIX .....</b>	<b>30</b>

I. REAL PARTIES IN INTEREST

The Assignee, SASOL Germany GmbH, is the only real party in interest with respect to the captioned patent application.

Application Serial No.: 09/890,696  
Appellants' Appeal Brief dated July 2, 2007

II. RELATED APPEALS AND INTERFERENCES

None.

III. STATUS OF CLAIMS

A. Status of the Claims

1. Claims cancelled: 1-10 and 18-19
2. Claims withdrawn (but not cancelled): None
3. Claims pending: 11-17 and 20
4. Claims allowed: None
5. Claims rejected: 11-17 and 20

B. Claims on Appeal: 11-17 and 20

Application Serial No.: 09/890,696  
Appellants' Appeal Brief dated July 2, 2007

IV. STATUS OF AMENDMENTS

No amendments were filed subsequent to the Final Rejection dated November 2, 2006.



V. SUMMARY OF THE CLAIMED SUBJECT MATTER

Claims 11 and 20 are independent claims. Claims 12-17 depend upon Claim 11. A summary of the subject matter of the claims currently on appeal is presented as follows:

Claim 11

Independent Claim 1 is directed to a microemulsion comprised of:

Component (A): 0.5 to 70% by weight of alkanolammonium salts of alkylsulfates and alkylpolyalkyleneglycoethersulfates having a specified structure;

Component (B): 20-95% by weight water;

Component (C): 0.1 to 20% by weight of at least one oil component; and

Component (D): 0.1 to 20% by weight of at least one mono- or polyvalent C<sub>2</sub>- to C<sub>24</sub>-alcohol, the microemulsion being optically transparent.

Claim 12

Claim 12, dependent on Claim 11, more narrowly defines Component (A) the alkanolammonium salts of the alkylsulfates and/or alkylpolyalkyleneglycoethersulfates.

Claim 13

Claim 13 dependent on any one of Claims 11 or 12 specifies that the microemulsion contains:

Component (A) in an amount of 2 to 60% by weight,

Component (B) in an amount of 30 to 80% by weight,

Component (C) in an amount of 0.5 to 15% by weight, and

Component (D) in an amount of 0.1 to 9% by weight.

Claim 14

Claim 14, dependent on any one of Claims 11 and 12, specifies that the microemulsion can further contain

Component (E): 0 to 20% by weight of at least one surfactant,

Component (F): 0 to 20% by weight of at least one electrolyte, and

Component (G): 0 to 10% by weight of at least one additive, wherein (F) and (G) are exclusive of any ionic surfactant.

Claim 15

Claim 15, dependent upon Claim 14, limits component (E) to at least one additional component of:

Component (E): at least one additional surfactant comprising a triglyceride alkoxylated with ethylene oxide and/or propylene oxide and at least partially esterified with a C<sub>6</sub>- to C<sub>22</sub>-fatty acid, and

Component (G): at least one additive comprising a poly(C<sub>2</sub>- to C<sub>4</sub>-)alkyleneglycol having a molecular weight of up to 1,500 g/mole.

Claim 16

Claim 16, dependent on any one of Claims 11 and 12, sets forth a large Markush group of components that can form the oil Component (C).

Claim 17

Claim 17, dependent on any one of Claims 11 and 12, recites that the microemulsion is a stable and transparent emulsion, the dispersed phase having an average particle size of less than 100 nm.

Claim 20

Claim 20 is an independent claim similar to Claim 11 but differing in that it adds additional components namely:

Component (E): one or more additional surfactants;

Component (F): one or more electrolytes; and

Component (G): one or more additives

and further recites that no compound falls under two categories of (A) to (G) at the same time, the microemulsion being optically transparent. Additionally, Claim 20 is in a more closed form employing the transition language "consisting essentially of."

VI. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

1. Whether Claims 11-17 and 20 are unpatentable under 35 USC §103(a) as being obvious over Lerg et al, (U.S. 6,132,738) in view of Balzer (U.S. 5,605,651) and Bergmann et al (U.S. 5,077,040) in further view of Ansmann et al (EP 771559), Scholz et al (DE 3534733) and Appellants' admission.

2. Whether Claims 11-17 and 20 are unpatentable under 35 USC 103(a) as being obvious over Hermann et al (U.S. 4,371,548) in view of Balzer (U.S. 5,605,651) and Bergmann et al (U.S. 5,077,040), and in further view of Ansmann et al (EP 771559 A1).

VII. ARGUMENT

A. Rejections under 35 U.S.C. §103(a) over Lerg et al. U.S. 6,132,738 (Lerg) in view of Balzer U.S. 5,605,651 (Balzer) and Bergmann et al U.S. 5,077,040 (Bergmann), in further view of Ansmann et al EP 771 559 (Ansmann), Scholz et al DE 3534733 (Scholz) and Appellants' admission.

1. Obviousness Standard

The United States Supreme Court in KSR International Co. v. Teleflex Inc., 550 U.S. \_\_\_\_\_ (April 30, 2007); 127 S.Ct. 1727; 82 USPQ 2d 1385 recently considered the criteria for obviousness under §103 and in doing so examined the Federal Circuits test of obviousness under the “teaching, suggestion, or motivation” (TSM) test under which a patent claim is only proved obvious if some motivation or suggestion to combine the prior art teaching can be found in the prior art, the nature of the problem, or the knowledge of the person having ordinary skill in the art. While the Supreme Court acknowledged that the TSM test applied by the Federal Circuit had captured a helpful insight vis-à-vis the issue of obviousness *vel non* the Court criticized the application of the TSM test when applied in a rigid and mandatory manner as being incompatible with the Court's precedents.

It is Appellants' position that even by the standards enunciated by the Supreme Court in KSR case, none of Appellants' claims are obvious in view of the cited art.

2. Claims 11-17 and 20

The thrust of the rejection in this instance, is that Lerg teaches a cosmetic cleaning composition for a shower comprising fatty alcohol ether sulfate alkanolammonium salt, or fatty alcohol sulphate alkanolammonium salt, an oil component, a low alkyl alcohol and other well known cosmetic additives including a surfactant and that Lerg further teaches it is considered within the skill of the art to formulate various forms of oil-containing compositions including oil and water

emulsions by using proper surfactants. The Examiner then goes on to state that Lerg et al points out that artisans are motivated to make concentrated forms simply because concentrated forms are convenient (compared to diluted which would require the handling of large volumes when used) referring to col. 2, ll. 1-6 of Lerg. The Examiner recognizes that Lerg does not teach expressly a diluted form, i.e., with substantial amounts of water and in the form of a microemulsion.

To cure the infirmity of Lerg, the Examiner resorts to a combination of Lerg with Balzer, Bergman, Ansmann, Appellants' admission and Scholz and concludes that it would have been prima facie obvious to the skilled artisan to dilute the composition of Lerg et al. with water and formulate the composition into microemulsion form.

As can be seen from the above, the Examiner has basically cast the patentability issue and buttressed the rejections on the proposition that it would simply be obvious to dilute the Lerg composition and form it into a microemulsion to arrive at Appellants' claimed composition. In essence, the Examiner has taken the position that the express teachings of Lerg can simply be ignored and the Examiner's judgment substituted therefor. It is useful, therefore, as a first step, to delineate the difference between Appellants' composition and the Lerg composition as follows:

	<b>Appellants' Composition (In Part)</b>	<b>Lerg et al. Composition (In Part)</b>
Oil Component	0.1 to 20 % by weight	30 to 45 % by weight
Water Content	20 to 95 % by weight	"At most 3.5 % weight"
Microemulsion	Yes	No
Optically Transparent	Yes	No

Despite the glaring differences between Appellants' composition and the Lerg composition, the Examiner tenaciously clings to the erroneous conclusion that, *inter alia*, Appellants' composition is still nothing more than a diluted form of Lerg albeit modified by the secondary references. The Examiner's attempted combination of Lerg with the secondary references to Balzer, Bergmann, Ansmann, Appellants' admission and Scholz, do absolutely nothing to address the fact that none of

those references cure the infirmities of Lerg vis-à-vis teaching or suggesting anything remotely resembling Appellants' composition as set forth above and compared with the Lerg composition.

The thrust of the Examiner's position that a person of ordinary skill in the art would have been motivated to dilute the composition of Lerg with water and formulate the composition into a microemulsion simply because fatty acid ether sulphate alkanolammonium salts, or fatty alcohol sulphate alkanolammonium salts are known to be useful as emulsifiers and particularly useful in microemulsion cosmetic compositions misses the mark. Assuming *arguendo* the Examiner is correct, how does the Examiner deal with the problem that the Lerg composition and Appellants' composition are so vastly different. It is no answer to say, that it would be obvious to dilute the Lerg composition merely because fatty alcohol ether sulphate alkanolammonium salts or fatty alcohol sulphate alkanolammonium salts are known to be useful as emulsifiers. That position with all due respect is simply illogical. Simply because a material can be used to form a microemulsion in some compositions provides no logical basis to form a different composition and in this case dramatically change the oil and water content.

The Examiner has previously pointed to column 2, lines 1-5 of Lerg apparently for support for this dilution theory. The cited lines of Lerg simply teach that a disadvantage of some prior art bath preparations is that they are present in dilute form because a bath tub can hold up to several hundred liters of water and to accommodate this the bath preparation must be formulated by employing large amounts of oil in the bath preparation to be used. How does that teaching remotely suggest that the Lerg composition could be modified to dramatically increase the water content and dramatically lower the oil content?

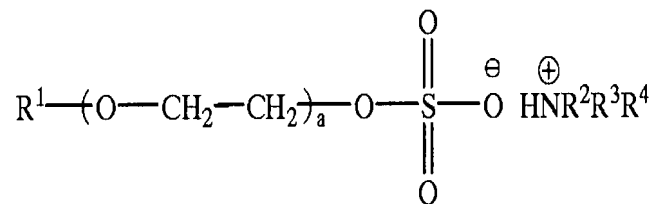
The Examiner has overlooked what Lerg considers the invention of the Lerg patent, i.e., "a markedly lower oil content which is still able to refat the skin." If indeed that is "surprising and

unforeseeable” as stated by Lerg in column 2, lines 24 et seq., then Appellants’ composition is even more surprising and more unforeseeable since Appellants have even far less oil in its composition than Lerg.

The Examiner continues to point to the fact that Appellants’ “diluted composition,” even though it is inferior because of its “inconvenience” is nonetheless deemed to be obvious in view of and not patentably distinct from the concentrated form. To begin with, the Examiner in focusing simply on “dilute versus concentrated” has simply assumed without any support, that Appellants’ composition is inferior presumably because it does not have the oil content of Lerg. Appellants respectfully request the Examiner to point out how Appellants’ composition is inferior to that of Lerg simply because it has a lower oil content. Furthermore, and as expressly recognized by the Examiner, Lerg does not teach a composition with substantial amounts of water or a composition in the form of a microemulsion, much less an optically transparent microemulsion. The best that can be said with respect to Lerg, is that with the use of a proper emulsifier, Lerg may form a non-transparent emulsion but not an optically transparent microemulsion.

Lerg teaches the following necessary components and concentrations:

- (a) a content of at most 55% by weight, based on the total weight of the preparations, of one or more surfactants selected from the group consisting of trialkyl- and/or trialkanolamine salts of fatty alcohol ether sulphates of the formula:





wherein a is from 1 to 10, and R<sup>1</sup> is selected from the group consisting of branched and unbranched alkyl groups having from 6 to 24 carbon atoms, and R<sup>2</sup>, R<sup>3</sup> and R<sup>4</sup> independently are selected from the group consisting of branched and unbranched alkyl and hydroxyalkyl radicals having from 1 to 24 carbon atoms,

- (b) a content of from 30 to 45% by weight, based on the total weight of the preparations, of one or more oil components selected from the group consisting of lipids, which contain from 1 to 3 acyl radicals, which have been esterified using an alcohol,
- (c) a content of at most 3.5% by weight, based on the total weight of the preparation, of water.

Diluting Lerg's composition with water to raise the water content to the amount of 20 wt% according to the present invention would require adding more than 17,5 wt% of water. This would not only contradict the teaching in Lerg according to which the water content is not allowed to exceed 3.5 wt%, but it will necessarily bring down the oil content to below 27,5 wt% (the oil content before the dilution with water is the maximum allowed, namely 45 wt%). Lerg makes clear that a minimum oil content of 30 wt% is required. Diluting the Lerg composition to the extent proposed by the Examiner therefore clearly contradicts the teaching of Lerg, i.e., Lerg teaches away from Appellants' claimed invention.

Furthermore, even assuming that the Lerg composition was diluted, there is absolutely no reason to believe that an optically transparent microemulsion would be formed. An everyday example of this is the fact that when an emulsion such as milk is diluted, no transparent microemulsion is formed. Simply stated, even when a microemulsion is diluted, it may still remain a non-transparent emulsion.

While Balzer does mention alkyl sulphates or alkyl ether sulphates in a long list of possible co-emulsifiers, nowhere does Balzer disclose the compound (A) with R<sup>4</sup> isopropyl as per Appellants' claims.

Furthermore, Balzer does not teach the presence of mono- or polyvalent C<sub>2</sub>-C<sub>24</sub> alcohols. Alkylpolyglycosides (APG) are not "polyvalent C<sub>2</sub>C<sub>24</sub> alcohols" as APG's fall under category (E), further surfactants set forth in Claim 14.

With respect to Claim 20, that claim includes the limitation "wherein no compound falls under two categories at the same time." APG cannot fall under (D) and (E) at the same time and can clearly only be (D) only.

The microemulsions of Balzer require the presence of at least 80 weight % alkylpolyglycosides (APG). Such a composition does not resemble Claim 11 and in this regard note that components (A) to (D) of Claim 1 add up to 20.7 weight %. Firstly, this requirement of 80 weight % APG is contradictory to the teaching of Lerg that requires at least 30 % by weight of an oil component, and nowhere in Lerg is APG suggested as a further surfactant.

Not only does Balzer fail to cure the infirmities of Lerg et al. vis-à-vis Appellants' claims, it actually would lead the skilled artisan away from Appellants' claims since Balzer requires requires at least 80 % by weight APG based on the sum of APG and co-surfactant and Lerg specifically requires at least 30% by weight of an oil component and nowhere in Lerg is APG suggested as a further surfactant.

As to Bergmann, the reference is very similar to Balzer with the exception that Bergmann mentions triethanolamine salts of lauryl sulphate and lauryl ether sulphate among other possible surfactants (column 18, line 63-64). However, triethanolamine salts are not called for in either Claims 11 or 20 of Appellants' application.

Furthermore, such compounds do not form a microemulsion and are only part of a composition comprising a cleansing surfactant to which a microemulsion may be added (column 18, line 34-46 of Bergmann). Further, Bergmann does not disclose whether an oil component in the amount specified in Claim 11 or 20 is part of the composition and polyols are mentioned as a further optional ingredient of the emulsion of Bergmann but not with reference to component (A) of Claim 11. It is simply impossible to combine the teachings of Lerg with Bergmann as Bergmann requires significant amounts of water to be present (column 18, lines 5-6). That teaching is directly contrary to the critical limitation of Lerg, i.e., that the composition contains "a water content of at most 3.5 % by weight." See column 2, lines 42-43.

Scholz disclose aqueous surfactant preparations which foam and will contain 0.05 to 3% by weight of water-insoluble oils, fats or waxes which have been solubilized to give a clear solution and are prepared by mixing

- (A) oil, fat or wax
- (B) a non-ionic polyethoxylated emulsifier, the mixture being heated where appropriate above its melting point
- (C) adding an aqueous solution which has been heated to the same temperature of an anionic surfactant and
- (D) where appropriate, including amphoteric and/or zwitterionic surfactants and/or amine oxide surfactants.

Suitable and preferred polyethoxylated emulsifiers and fatty acids (C<sub>8</sub>-C<sub>18</sub> mono- and di-esters of adducts of 4 to 20 mol of ethylene oxide and glycerol or adducts of 4 to 20 mol of ethylene oxide and fatty acid C<sub>8</sub>-C<sub>18</sub>, mono-, di- and triglycerides. Scholtz does teach the use of a number of anionic surfactants, but there is no teaching or mention of isopropanol alkanol ammonium salts as

claimed by Appellant.

While the Examiner has referred to Appellants' "admission," the nature or effect of the admission has not been addressed by the Examiner.

In an attempt to buttress the convoluted rejection of the claims based on Lerg and the secondary reference, the Examiner resorts to the proposition that mere optimization is involved and in this regard cites *In re Boesch and Slaney*, 204 (sic) USPQ 15 (CCPA). The Examiner's reliance on *In re Boesch and Slaney* is misplaced. As the Court said in *In re Boesch and Slaney*, the prior art would have suggested "the kind of experimentation necessary to achieve the claimed composition, including the proportional balancing described by Appellant's Nv equation." 205 USPQ at 219. Lerg, in no way suggest "the kind of experimentation necessary to achieve Appellant's claimed composition." To the contrary, Lerg claims to have made a marked improvement in a shower preparation by reducing the oil content vis-à-vis the prior art while still retaining the ability to refat the skin to the same extent. This goal is accomplished by using an oil content of from 30-45% by weight and a water content of at most 3.5% by weight. With that backdrop, what would drive the skilled artisan to arrive at a water content of 20-95% by weight when Lerg teaches that the maximum water content that can be tolerated is 3.5% by weight? It can hardly be argued that when Appellants' claimed range is 20-95% by weight water, Appellants' invention amounts to mere optimization of a composition which is limited to "at most 3.5% by weight" water. That position is illogical. The fact is Lerg teaches away from Appellants' composition by stressing that the maximum amount of water that can be used is 3.5% by weight.

Thus, it is readily apparent that Lerg falls short of Appellants' invention for three reasons:

1. Lerg teaches that a water content of no more than 3.5% by weight can be tolerated;
2. Lerg teaches that the oil content must be from 30-45% by weight; and

3. Lerg does not teach that the compositions are microemulsions.

None of those infirmities are cured by resort to the secondary references.

Again resorting to the case law in an attempt bootstrap the untenable rejection based on Lerg and the secondary reference, the Examiner relies on *In re Gurley*, 31 USPQ 2d 1130 (Fed. Cir. 1994) for the proposition that an obvious composition does not become patentable simply because it had been described as somewhat inferior to some other product for the same use. The Examiner then concludes that a diluted form of a known cosmetic or pharmaceutical composition (even though known to be inferior for its inconvenience) is deemed obvious in its concentrated form and not patentably distinct from the concentrated form.

To begin with, the facts of *In re Gurley* are inapposite to the facts of this case. In *In re Gurley* the reference disclosed forming a circuit board from epoxy albeit that the reference suggested such circuit boards have less desirable physical properties than those made using a fibrous substrate impregnated with a polyester-imide resin instead of epoxy resin. Nonetheless, the facts in *In re Gurley* showed a clear unmistakable, indeed even anticipating disclosure of a circuit board made with an epoxy resin.

The facts in *In re Gurley* in no way resemble the facts of this case. Appellants' composition is simply not, as suggested by the Examiner, optimization of a result effective parameter. The Lerg reference distinguished itself from the prior art, so-called high oil content preparations in that it had a "markedly low oil content" see column 2, lines 25-26. In other words, Lerg was trying to achieve a composition which, notwithstanding that it had a much lower oil content than the prior art compositions, nonetheless possessed advantages over the prior art of higher foaming and being better tolerated. However, to achieve this result a critical limitation of the Lerg composition is that it contain no more than 3.5% by weight water based on the total weight of the preparation. Employing

this critical, low water content, Lerg claims that surprisingly there is produced a composition with lower oil content which can refat the skin to the same extent as prior art compositions having much higher oil content with the added advantage over the prior art of having higher foaming and better tolerated.

Appellant's composition accomplished what Lerg wanted to accomplish, i.e., lowered oil content, better foaming and better tolerated. However, Appellant accomplished that goal by use of a microemulsion which contained at maximum 20% by weight of an oil component, and 20 to 95% by weight water as compared with Lerg's 30-45% by weight of an oil component and a maximum 3.5% water. Appellant's compositions, as seen on page 3, line 29 - page 4, line 10 of Appellants' disclosure, combined the cleaning properties of an aqueous surfactant formulation, the cosmetic properties of an oil component and are better tolerated in terms of being a non-irritant to the skin. Appellants did not optimize Lerg - they made a patentable improvement over Lerg.

Appellants respectfully submit that Claims 11-17 and 20 are clearly patentable over Lerg in view of the secondary references.

B. Rejections under 35 USC 103 over Hermann et al. (Hermann) in view of Balzer and Bergmann and further in view of Ansmann.

1. Obviousness Standard

Appellants have discussed the obviousness standard above and adopt it for a discussion of these rejections.

2. Claims 11-17 and 20

The Balzer, Bergman and Ansmann references have been discussed at some length above. With respect to Hermann, that reference, like Lerg teaches that the amount of water present must be kept low, e.g., not in excess of 15% by weight of the composition. Appellant would again point out

that the teachings of Lerg and Hermann point to the fallacy of the Examiner's apparent position that if the oil content is high, one simply lowers the amount of water. While Lerg discloses 30-45% by weight oil and at most 3.5% by weight water, Hermann discloses 20-60% by weight oil but up to 15% by weight water, i.e., nearly 5 times the amount that Lerg says is acceptable for basically the same amount of oil.

The reason Hermann can tolerate much more water than Lerg is because Lerg and Hermann disclose different composition. Likewise, the reason Appellant can tolerate even larger amounts of water is because Appellants' composition is different from Hermann and Lerg. Additionally, like Lerg, Hermann cannot tolerate Appellants' claimed oil content. Appellants' remarks above regarding the case law cited by the Examiner vis-a-vis Lerg are equally applicable to the Examiner's position with respect to the Hermann reference. As to any proposed combination of Hermann with Balzer, Bergmann or Ansmann, Appellants' remarks above with respect to the combination of those secondary references with Lerg are equally applicable here. It is respectfully submitted Claims 11-17 and 20 are patentable over Hermann in combination with any of the secondary references.

Appellants deem it necessary to address Claims 20 in greater detail as that claim is in the more closed format employing the transition phrase "consisting essentially of" which further distinguishes Claim 20 from the cited art. The examples in Appellants' specification show that the microemulsions produced possess high cleaning and foaming ability, good initial foaming power, storage stability and mildness to the skin. It clearly can be argued that Lerg, Hermann and Appellants' compositions are all directed at skin cleaning composition of one kind or another. However, it is at that point that the similarity between the compositions of the two primary references and Appellants' composition ends. Indeed, as noted above, Appellants' compositions differ from the compositions of either Lerg or Hermann more than the two latter compositions differ

from each other. Nonetheless, they are all different compositions and patentably distinct from one another.

Although not addressed previously, in applying both Lerg and Hermann, the Examiner has also relied on *In re Sparta*, 15 USPQ 1655 (Fed. Cir. 1990) and MPEP 2112.01. The Examiner's reliance on *In re Sparta* is also misplaced. In *In re Sparta* there was no question that the polymers being made from identical monomers employing the same or similar polymerization techniques would produce polymers having identical compositions to that of the prior art. "Products of identical chemical composition cannot have mutually exclusive properties." 15 USPQ 2d at 1659. That is not the case here. Indeed, in *Sparta* the issue was anticipation not obviousness. The Examiner has tacitly recognized that the compositions of Lerg and Hermann are not identical to Appellants' composition. That being the case, and contrary to the Examiner's position, the burden has not been shifted to Appellant to show that the prior art product does not possess the same property as Appellants' claimed product. Unlike *Sparta* where the products were the same as disclosed in the prior art here, by the Examiner's own admission, they are different.

In KSR, the Court quoting from *In re Kahn* 411 F.3d 977, 988 (Fed. Cir. 2006) said:

"[R]ejections on obviousness grounds cannot be sustained by mere conclusionary statements; instead, there must be some articulated reasoning with some rational underpinning to support the conclusion of obviousness."

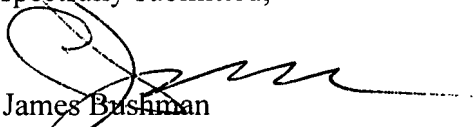
It is respectfully submitted that the Examiner's obviousness rejections are merely conclusionary with no rational underpinning.



C. Conclusion

For the foregoing reasons, it is submitted that the rejections of Claims 11-17 and 20 are erroneous and reversal of the Examiner's decision with allowance of Claims 11-17 and 20 is respectfully requested.

Respectfully submitted,

  
C. James Bushman  
Reg. No. 24,810

Date: July 2, 2007

BROWNING BUSHMAN P.C.  
5718 Westheimer, Suite 1800  
Houston, TX 77057-5771  
Tel.: (713) 266-5593  
Fax: (713) 266-5169

CERTIFICATE OF EXPRESS MAILING

I hereby certify that this correspondence and all referenced enclosures are being deposited by me with the United States Postal Service as Express Mail with Receipt No. EV317508719US in an envelope addressed to the Mail Stop Appeal Brief – Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on July 2, 2007.

  
Cathy Hayes

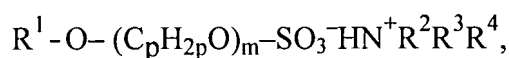
VIII. CLAIMS APPENDIX

A copy of the claims presented in this appeal is included below:

1-10 (Cancelled)

11. A microemulsion comprising:

(A) 0.5 to 70% by weight of the alkanolammonium salts of alkylsulfates and alkylpolyalkyleneglycolethersulfates having the structure:



wherein

$R^1$  is a  $C_8$ - to  $C_{20}$ -hydrocarbon residue,

$p$  is an integer from 2 to 5, wherein  $p$  can be different for each  $m$ ,

$R^2$  is H, a  $C_1$ - to  $C_6$ -alkyl, or a  $C_2$ - to  $C_4$ -hydroxyalkyl,

$R^3$  is H, a  $C_1$ - to  $C_6$ -alkyl, or a  $C_2$ - to  $C_4$ -hydroxyalkyl,

$R^4$  is a hydroxyisopropyl, and

$m$  is an integer from 0 to 7,

and mixtures thereof;

(B) 20 to 95% by weight water;

(C) 0.1 to 20% by weight of at least one oil component; and

(D) 0.1 to 20% by weight of at least one mono- or polyvalent  $C_2$ - to  $C_{24}$ -alcohol,

each based on the total composition of the microemulsion, said microemulsion being optically transparent.

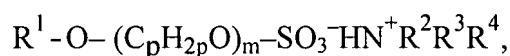
12. The microemulsion according to claim 11, wherein the alkanolammonium salts of the alkylsulfates and/or alkylpolyalkyleneglycoethersulfates comprise the following residue or indices:
- $R^1$  is a linear and saturated  $C_{12}$ - to  $C_{16}$ -alkyl residue,
- p is 2 or 3, wherein p can be different for each m,
- $R^2$  is H or hydroxyisopropyl,
- $R^3$  is H or hydroxyisopropyl,
- $R^4$  is hydroxyisopropyl, and
- m is an integer from 0 to 2.
13. The microemulsion according to any one of claims 11 and 12, wherein the microemulsion contains component
- (A) in an amount of 2 to 60% by weight,
- (B) in an amount of 30 to 80% by weight,
- (C) in an amount of 0.5 to 15% by weight, and
- (D) in an amount of 0.1 to 9% by weight.
14. The microemulsion according to any one of claims 11 and 12, further containing at least one of the following components:
- (E) 0 to 20% by weight of at least one surfactant,
- (F) 0 to 20% by weight of at least one electrolyte, and

- (G) 0 to 10% by weight of at least one additive, wherein (F) and (G) are exclusive of any ionic surfactant.
15. The microemulsion according to claim 14, containing at least one of the following components:
- (E) at least one additional surfactant comprising a triglyceride alkoxyated with ethyleneoxide and/or propyleneoxide and at least partially esterified with a C<sub>6</sub>- to C<sub>22</sub>-fatty acid, and
- (G) at least one additive comprising a poly(C<sub>2</sub>- to C<sub>4</sub>-)alkyleneglycol having a molecular weight of up to 1,500 g/mole.
16. The microemulsion according to any one of claims 11 and 12, wherein the oil component (C) contains one or more components selected from the group consisting of lecithins; mono-, di-, and/or triglycerides of saturated and/or unsaturated, branched and/or linear carboxylic acids having chain lengths of from 8 to 24 carbon atoms; branched and/or linear hydrocarbons; waxes; petroleum jelly; paraffin oils; polyolefins; silicone oils; esters of saturated, unsaturated, and/or aromatic, branched and/or linear carboxylic acids having chain lengths of from 3 to 30 carbon atoms; and saturated and/or unsaturated, branched and/or linear alcohols having chain lengths of from 3 to 30 carbon atoms.
17. The microemulsion according to any one of claims 11 and 12, characterized in that the microemulsion is a stable and transparent emulsion, the disperse phase thereof having an average particle size of less than 100 nm.

18-19. (Cancelled)

20. A microemulsion consisting essentially of:

- (A) 0.5 to 70% by weight alkanolammonium salts of the alkylsulfates and/or alkyl-polyalkyleneglycolethersulfates having the structure:



wherein

$R^1$  is a  $C_8$ - to  $C_{20}$ -hydrocarbon residue,

$p$  is an integer from 2 to 5, wherein  $p$  can be different for each  $m$ ,

$R^2$  is H, a  $C_1$ - to  $C_6$ -alkyl, or hydroxyisopropyl,

$R^3$  is H, a  $C_1$ - to  $C_6$ -alkyl, or  $C_4$ -hydroxyisopropyl,

$R^4$  is a hydroxyisopropyl, and

$m$  is an integer from 0 to 7,

and mixtures thereof;

- (B) 20 to 95% by weight water, and
- (C) 0.1 to 20% by weight one or more oil component(s), and
- (D) 0.1 to 20% by weight of one or more mono- or polyvalent  $C_2$ - to  $C_{24}$ -alcohol(s),  
and optionally
- (E) 0 to 20% by weight of one or more additional surfactant(s)
- (F) 0 to 20% by weight of one or more electrolyte(s), and
- (G) 0 to 10% by weight of one or more additive(s)

each based on the total composition, and

wherein no compound falls under two categories of (A) to (G) at the same time, said

microemulsion being optically transparent.

Application Serial No.: 09/890,696  
Appellants' Appeal Brief dated July 2, 2007

IX. EVIDENCE APPENDIX

None.

Application Serial No.: 09/890,696  
Appellants' Appeal Brief dated July 2, 2007

X. RELATED PROCEEDINGS APPENDIX

None.